The Pay Equity Hearings Tribunal

Ontario

Annual Report
2009-2010

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PEHT Annual Report 2009-2010

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Mandate

The Pay Equity Hearings Tribunal (the "Tribunal") is responsible for adjudicating disputes that arise under the *Pay Equity Act* (the *"PEA"*). It is a quasi-judicial, administrative Tribunal, separate and independent from the Pay Equity Office. The Tribunal was established under the *PEA* as a tripartite board, composed of the Chair (Presiding Officer), a number of Vice-Chairs (Deputy Presiding Officers), and Members, equal in number, representative of employers and employees.

The Tribunal deals exclusively with issues arising under the *PEA*. The Tribunal has exclusive jurisdiction to determine all questions of fact or law that arise in any matter before it. The decision of the Tribunal is final and conclusive for all purposes. Decisions of the Tribunal cannot be appealed but may be judicially reviewed.

Overview of Programs and Activities

The pay equity cases which have been mediated or adjudicated by the Tribunal during the 2009/2010 reporting period, continue to raise new legal issues. For example, during the 2009/2010 reporting period the Tribunal issued a decision in which it determined the meaning of "job class" and whether the compensation practice known as "gold circling" creates an exception to the *PEA*. We continue to receive applications from public sector employers who are required to comply with the proxy provisions of the *PEA*, but claim that they are not funded to meet the resulting obligations to make pay adjustments.

Where parties to an application before the Tribunal agree to adjourn the matter, the Tribunal has implemented a policy of issuing a decisions stating that, if the matter is not brought back on for hearing within one year, it will be terminated. When a party brings an application, the Tribunal has an institutional interest in seeing the matter is resolved expeditiously. The Tribunal must also ensure that resorting to our process is not used as a means to shelter from compliance with a Review Officer's Order.

Tribunal adjudicators have participated in training and professional development opportunities, as both mentors and learners. Members and Vice-Chairs have been active in the Society of Ontario Adjudicators and Regulators, in conference planning and workshop leadership. One Member has been applying her alternative dispute resolution skills at another tribunal on an informal, but highly effective, basis.

Mission Statement

The purpose of the *PEA* is to redress systemic gender discrimination in compensation for work performed by employees in female job classes. Its implementation contributes to a fairer and more productive workplace where women and men may achieve equality. The goals of the *PEA* can best be achieved through the co-operation of employers, bargaining agents and employees. The Tribunal is committed to encouraging settlement between the parties. The Tribunal is also committed to a hearing process that balances the need to be fair, accessible, and efficient.

Organizational Structure

The Ontario Labour Relations Board (the "OLRB") provides senior administrative and institutional support to the Tribunal. The Tribunal benefits from the sophisticated administrative and legal support, as well as information technology, at the OLRB, and the potential to take advantage of the expertise of its mediators. While the Tribunal has its own complement of Vice-Chairs and Members, the Tribunal Vice-Chairs are cross appointed to other tribunals ensuring that the Tribunal is staffed with experienced decision-makers at a cost that is shared with other tribunals.

The Tribunal also participates in a broader, shared-services arrangement with the OLRB and the Workplace Safety and Insurance Appeals Tribunal. These adjudicative agencies share: printing and production, hearing and meeting rooms and common library services.

PEHT – Names of Appointees and Terms of Appointments

ADJUDICATOR	CROSS-APPOINTED	POSITION	FIRST APPOINTED	TERM EXPIRES
Gee, Diane	OLRB/PEHT	Chair	August 1, 2008	July 31, 2013
McKellar, Mary Anne	HRTO/PEHT HRTO/OLRB/PEHT	Vice-Chair	September 1, 1992 April 2, 2001	Jan 23, 2012
Bickley, Catherine	PEHT	Member (Employee)	April 26, 2000	April 1, 2013
Stewart-Rose, Diane	PEHT	Full-Time Member (Employer) Part-Time Member (Employer)	April 3, 2002 April 3, 2004	April 2, 2003 April 2, 2013
Kvetan, Margaret	PEHT	Member (Employer)	February 22, 1995	Feb. 21, 2013
Seville, Pauline	PEHT	Member (Employee)	May 13, 1998	April 2, 2012
Kelly, Patrick	OLRB/PEHT	Vice-Chair	May 18, 2008	May 17, 2013

Analysis of Operational Performance

With respect to the adjudication of disputes, the Tribunal has continued to place emphasis on facilitating settlements. The Tribunal schedules a Pre-Hearing Conference in almost every case, where the aim is to organize and streamline the issues for hearing, while at the same time looking for opportunities to settle the entire dispute. The Tribunal uses a Vice-Chair who will not be on the hearing panel to convene the pre-hearing. Even when a hearing has commenced, the panels will look for openings to mediate some or all of the issues. Members have been very effective in working with parties in this context. Recently, in a further effort to reduce costs to both the Tribunal and the parties, the Tribunal has, where possible, encouraged the use of written hearings. In this way, parties are saved the cost of traveling to the Tribunal as well as the time involved in attending. The Tribunal saves valuable hearing time for cases that must proceed to an oral hearing.

The Tribunal considers hearing time to be a "resource" that should be valued. We encourage and direct parties to exchange materials in advance, and communicate intentions to bring motions etc. to better use available hearing time.

PEHT - Caseload Statistics

	Caseload			Disposed of					
Fiscal Year	Total	Pending April 1	Received Fiscal Year	Total	Granted	Dismissed	Terminated	Settled	Pending March 31
2009-10	50	28	22	37	8	4	1	24	13
2008-09	48	25	23	20	0	4	0	16	28
2007-08	34	12	22	9	2	1	0	6	25
2006-07	25	10	15	13	3	4	0	6	12
2005-06	16	5	11	6	3	2	0	1	10

Analysis of Financial Performance

In accordance with the Ministry of Labour's Delegation of Financial Authority Framework, financial authority is delegated to the Tribunal. The Chair is required to ensure that public funds are used with integrity and honesty. The Tribunal's operating budget is included in the Ministry of Labour's estimates and allocations process, and the Tribunal is required to report to the Ministry each quarter with respect to its expenditures and planned future financial commitments.

Each year, the Tribunal verifies through a Certificate of Assurance, that all of its transactions are reflected accurately and completely in the Public Accounts of Ontario, which are the annual financial statements.

Expenditure Category	2009/10 Final Budget	2009/10 Actual Expenditure	Variance $	Variance Explanation
Salary & Wages	482.9	456.6	26.3	*Vacancy savings*
Employee Benefits	45.4	40.4	5.0	
Transportation & Communication	16.7	8.2	8.5	*Fewer out of town hearings*
Services (including lease)	63.9	59.1	4.1	*Lease savings returned to Treasury*
Supplies & Equipment	5.2	0	5.2	*Part of OLRB expenses*
Total	**614.1**	**565.0**	**49.1**	*9% budget constraint achieved*

PAY EQUITY HEARINGS TRIBUNAL

HIGHLIGHTS OF TRIBUNAL DECISIONS

Ontario Public Service Employees Union v. The Crown in Right of Ontario (Ministry of Government Services), May 28, 2009 (2691-08-PE)

OPSEU asserted that the Crown employer had not maintained pay equity as required by section 7 of the Act. The Crown submitted that the requirements of section 25(1) of the Act regarding the prior involvement of a Review Officer had not been satisfied, and thus the PEHT was without jurisdiction to hear the application. The PEHT held that it was without jurisdiction to hear the application as there had been no prior complaint or concern lodged with Review Services of the Pay Equity Commission. The PEHT clarified that there is no general exception to this rule where there is a pure legal issue to be determined.

Addiction Services of Eastern Ontario v. Canadian Union of Public Employees (CUPE) Local 1997-02, June 9, 2009 (3311-08-PE)

ASEO and CUPE negotiated and signed a pay equity plan on September 10, 1999 (the "Plan"). As of January 1, 2006 ASEO was in breach of its statutory obligations under section 13 of the Act by ceasing to make payments owing under the Plan. ASEO brought an application to have the order of a Review Officer stayed or set aside. ASEO asserted that CUPE was estopped from claiming entitlement to annual payments under the Plan due to a settlement entered into by CUPE and the Attorney General of Ontario, the Minister of Finance and the Lieutenant Governor in Council (collectively "the government"), whereby the government agreed to provide funding to proxy employers until December 31, 2005. CUPE asked that the application be dismissed, alleging that it did not make out a *prima facie* case. The PEHT held that the fact that the government did not agree to provide proxy employers with pay equity funding after December 31, 2005 did not mean that CUPE considered proxy employers to be relieved of their pay equity obligations thereafter. Neither the action nor the settlement between CUPE and the government could be considered to be a representation by CUPE to AESO that it was relieved of its pay equity obligations. Thus, there was no *prima facie* case that the elements necessary to found an estoppel existed.

Ontario Secondary School Teachers' Federation representing the EA/OCT/CYW Bargaining Unit v. Brant Haldimand-Norfolk Catholic District School Board, July 31, 2009 (0559-08-PE)

The PEHT held that section 9(3) of the Act precludes pro-rated pay equity adjustments to a multi-step pay grid attaching to female job classes capable of occupation by multiple incumbents. Each step of a multi-step pay grid must be adjusted by an equal dollar amount. While the effect of an equal dollar adjustment was to compress the pay grid for female job classes with multi-level pay grids that require pay equity adjustments, and the OSSTF gained an advantage that it did not collectively bargain for, the principle of unnecessarily interfering with a collectively bargained agreement did not trump the language of section 9(3). Section 9(3) prevents notional or partial pay equity by requiring an element of internal relativity in the pay grid attaching to a female job class to be preserved.

The Windsor Star v. Communications, Energy and Paperworkers Union, Local 517-G and 3035-08-PE **Communications, Energy and Paperworkers Union, Local 517-G v.** The Windsor Star, **October 19, 2009 (**2875-08-PE)

The employer and the union each filed applications challenging the decision of a Review Officer. The issue between the parties was whether operator positions constituted one or more "job classes". Some individuals in the operator position were paid the negotiated wage rate for the operator classification as set out in the collective agreement, whereas other individuals were paid the wage rate that applied to their previous positions and received negotiated increases in that rate of pay pursuant to the terms of a Letter of Understanding ("gold-circling"). The negotiated wage rate was less than the gold-circled rates by a substantial amount. The PEHT held that the definition of job class applied to determine whether the position of operator constituted one job class or more than one job class. The definition of "job class" indicated that multiple positions can be included in a single job class only if those positions have, amongst other things, the same compensation schedule, salary grade or range of salary grade. The PEHT found that the operator positions earning gold-circled wages were not in the same job class as those earning the negotiated wage rate as they did not have the same compensation schedule, salary grade or range of salary rates.

Flemingdon Neighbourhood Services v. David Lemire, October 23, 2009 (0822-09-PE)

The employer sought an order that its position of Executive Director was female dominated job class after a Review Officer ordered the employer to amend its Proxy Pay Equity Plan to indicate that the job class was gender neutral. The job class of Executive Director had a single incumbent. The PEHT reaffirmed its view that where a job class has a single incumbent, historical incumbency may not be a useful factor to consider. Rather, some weight must be given to gender stereotyping in the field of work. The PEHT considered the incumbency of the position in the sector, where 66 percent of Executive Director positions were held by women. The PEHT found that the sector incumbency statistics were sufficient to establish that the position of Executive Director was a stereotypically female position and thus was to be regarded as a female dominated position.

Performance Measure	Standard / Target	Performance Commitment	Performance Achievement[1]
Acknowledgement of applications to the Tribunal	100% of applications to be acknowledged within 3 days of filing at the Tribunal	90% within 3 business days; balance within 7 business days.	Commitment met
Notification of scheduling pre-hearing conference.	100% of hearing ready Applications are offered a pre-hearing conference within one month of receipt.	100% of hearing-ready applications to be offered a pre-hearing conference within one month of receipt.	Commitment met
Timeframe for release of a final decision after hearing completed (or after post-submissions received).	Median release time for final decision 120 days.	Achieve median release time of 120 days for final decisions.	The median release time for final decisions released to date is 15 days.
% of closed cases resolved through mediation.	50% of closed cases resolved through mediation.	50% of cases closed resolved through mediation.	65 % of cases closed were resolved through mediation.